IN THE

Supreme Court of the United States

October Term, 1953

No. 569

BYRON E. BORING, *Petitioner*

v.

STATE OF OHIO, *Respondent*

REPLY BRIEF ON BEHALF OF PETITIONER

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1. Respondent contends (Resp. Br., p. 7) there is no proof that the witness Shackelford was not sworn; this is untrue. The affidavit of Raymond Crozier, deputy clerk, is decisive on the point; Crozier did not aver that the witness was not sworn *by him;* Crozier swore to his personal knowledge that Shackelford "was not sworn before she gave her testimony in said trial." (R., p. 70). The mere statement of the prosecuting attorney that the witness was sworn in his presence by Crozier (R., p. 64) is thus directly controverted by Crozier's sworn statement that the witness was 'not sworn."

2. There is no evidence whatever to support respondent's charges of delay and non-disclosure (Resp. Br., pp. 6-9).

Ohio practice permits swearing of witnesses outside of the courtroom (R., p. 64). It was not immediately obvious, therefore, that the witness had not been sworn. Petitioner's objection was made well within the time when it could have been readily ascertained by the court whether the witness was prepared to swear to the truth of her testimony. The plain fact is that the court and petitioner were both misled, and further inquiry forestalled, by the personal assurance of the prosecuting attorney that the witness was sworn in his presence.

In none of the cases cited by respondent (Resp. Br., pp. 10-11) was objection to unsworn testimony made until after trial. In all of the cases cited the appellant knew that the evidence was unsworn at the time it was offered.

The "modern practice" referred to by Wigmore, Third Edition, § 1819 (Resp. Br., p. 11) is the swearing of witnesses as a group *in open court* at the opening of a trial. In Section 1819(c) Wigmore poses, but does not answer, the "larger question" of "whether the omission of the oath without fault of the objector is an error material to require a new trial." It is precisely this question on which we now seek a decision by this Court.

3. Respondent cites three cases in which this Court upheld state procedure as consistent with due process of law: *Twining* v. *Jersey,* 211 U.S. 78 (1908); *Allen* v. *Georgia,* 166 U.S. 138 (1897); and *Bute* v. *Illinois,* 333 U.S. 640 (1948). In all of these cases actions *in conformity* with state procedures were in issue. In this case, the issue is not the Constitutionality of established procedure, but the legal consequences, under the Due Process Clause, of deviation from such procedure; for the State of Ohio, like all of its sister states, requires that witnesses be sworn or affirmed. Ohio Gen. Code § 11520.

4. Respondent cites *Glasser* v. *United States,* 315 U.S. 60 (1942) and *Akins* v. *Texas,* 325 U.S. 398 (1945) in support of the position that this Court will not retry an issue of fact. In the *Glasser* case, the "fact" involved was not

whether a constitutional safeguard had been observed. In *Akins,* the "fact" was Constitutional, *viz.,* alleged discrimination in impanelling a grand jury. The Texas court, however, had held a hearing expressly to determine whether there was discrimination, and found that there was none. In this case, the appellate courts of Ohio made no attempt to ascertain whether the witness Shackelford was sworn; and the trial court's ruling was made without inquiry, and with assurances by the prosecuting attorney that Shackelford had been sworn.

5. Respondent invokes the "presumption of regularity"—the presumption that public officers have done their duty—as a basis for upholding the decision below. (Resp. Br., pp. 20-22). We note that in respondent's view no such presumption inures to petitioner's benefit for purposes of evaluating the timeliness of his objection to the Shackelford testimony. Respondent's argument (Resp. Br., pp. 5-13) in effect denies that petitioner could, honestly and without negligence, have assumed, even temporarily, either that a witness put on the stand by the prosecution had been duly sworn outside the courtroom in accordance with Ohio practice, or that the prosecuting attorney's statements to the court were true.

6. Only two of the cases cited by respondent (Resp. Br., pp. 20-22) bear directly on the "presumption of regularity" invoked in support of the state court rulings: *Bute* v. *Illinois, supra,* and *United States* v. *Ross,* 92 U.S. 281 (1876). Neither provides authority for application of the presumption in this case. In *Bute* v. *Illinois,* this Court, in relying on the presumption, expressly noted the lack of "factual support" for appellant's position (333 U.S., at 671), and the "complete absence of any showing to the contrary" (333 U.S., at 672). In the *Ross* case, this Court reversed a Court of Claims decision on the ground that the lower court had allowed the "presumption of regularity" to replace proof. The view of this Court was expressed in the following language:

> The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. *United States* v. *Ross, supra,* p. 284.

CONCLUSION

At a time when difficult and disturbing questions are being raised by reliance in non-judicial proceedings on unsworn charges by informers, we submit that the role of the oath or affirmation as an integral element of due process in judicial proceedings is peculiarly important and timely. The issue is properly raised in this case and merits review by this Court.

If as we believe, a man cannot Constitutionally be deprived of life or liberty on unsworn testimony, then we are obliged to ask this Court, whether he can Constitutionally be held to have acquiesced in its use when his objection was over-ruled on the basis of the prosecuting attorney's misrepresentation that the witness was sworn.

Respectfully submitted,

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